(H)

No. 97-2048

In The

Supreme Court of the United States

October Term, 1998

WILLIAM D. O'SULLIVAN,

Petitioner,

v.

DARREN E. BOERCKEL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

This Court granted certiorari limited to the following question:

Whether a state prisoner may pursue claims in a federal habeas corpus petition which were not raised on direct appeal in a petition for discretionary review to the state's highest court.

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers is a District of Columbia non-profit corporation with a membership of more than 10,000 attorneys nationwide — along with 78 state and local affiliate organizations numbering 28,000 members in fifty states. NACDL was founded in 1958 to promote study and research in the field of criminal defense law, to disseminate and advance knowlege of the law in the area of criminal practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. Foremost among NACDL's objectives is to promote the proper administration of justice. It has appeared before this Court as *amicus curiae* on many occasions. *See, e.g., Stewart v. Martinez-Villareal*, 118 S.Ct. 1618 (1998); *Hohn v. United States*, 118 S.Ct. 1969 (1998).[1]

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1 Both parties have consented to NACDL's appearance as *amicus curiae* in this matter. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. Rule 37.6.

SUMMARY OF ARGUMENT

Where state prisoners have properly presented their federal claims at trial and on direct appeal as of right, these claims need not be raised in a petition for discretionary review in the state's highest court. There are few appeals as of right to states' highest courts in noncapital criminal cases and discretionary leave applications are routinely made and just as routinely denied. (The Illinois Supreme Court has granted discretionary review in only <3%-6% of the noncapital criminal cases in which review has been sought since 1990; the figures in the high courts of California and New York are comparable).

States' highest courts routinely have limitations on their jurisdiction and broad discretion in what cases they may or must hear — limitations and discretion imposed by state constitutions, statutes or court rules — and litigants are on notice that these courts exercise their discretion to hear cases sparingly, not unlike the certiorari practice in this Court. Accordingly, discretionary appeal is no longer a meaningful state remedy "presently available" to most noncapital criminal appellants.

This Court should interpret the federal habeas corpus exhaustion doctrine as it did in *Fay v. Noia*, 372 U.S. 391 (1963) and relieve state prisoners of the obligation to seek discretionary review in their state's highest court before completing direct review as of right.

ARGUMENT

STATE PRISONERS NEED NOT PRESENT FEDERAL CLAIMS TO STATES' HIGHEST COURTS ON PETITIONS FOR DISCRETIONARY REVIEW IN ORDER TO SATISFY THE FEDERAL HABEAS EXHAUSTION REQUIREMENT WHERE SUCH CLAIMS HAVE BEEN PROPERLY PRESENTED TO THE STATE COURTS ON DIRECT APPEAL AS OF RIGHT

The doctrine of "exhaustion of state remedies" requires state prisoners to adequately present their federal claims to the state trial and appellate courts before seeking relief from the federal courts. 28 U.S.C. §2254(b) & (c). Nonetheless, "the general rule of exhaustion 'is not rigid and inflexible'" (*Granberry v. Greer*, 481 U.S. 129, 136 (1987)(*quoting Frisbie v. Collins*, 342 U.S. 519, 522 (1952)), nor is it jurisdictional. *Id.* at 131; *Castille v. Peoples*, 489 U.S. 346, 349-50 (1989); *Strickland v. Washington*, 466 U.S. 668, 679, 684 (1984).

In this case, the Court of Appeals correctly determined that a state prisoner need not raise his federal claims in a petition for discretionary review in the Illinois Supreme Court before seeking federal habeas corpus review so long as he has properly raised them in his direct appeal (as of right) in the Illinois Appellate Court. J.A. 26-38. Accordingly, he should be deemed to have properly exhausted his state judicial remedies with respect to his federal claims and not to have procedurally defaulted them in the Illinois state courts. *Harris v. Reed*, 489 U.S. 255, 258, 263 & n.9 (1989); *Blackledge v. Perry*, 417 U.S. 21, 23-24 (1974); *Castille v. Peoples*, 489 U.S. at 347-48, 350-51.

In *Castille v. Peoples*, this Court summarized the law relevant to adequate presentation of federal claims to the state courts as a precondition to federal habeas review. The Court held that where the federal claim was not asserted during appeal as of right in the state courts, its belated presentation for the first and only time in a petition for discretionary review in the state's highest court — where the merits ordinarily will not be considered "unless there are special and important reasons therefor" — did not constitute "fair presentation" of the claim in the state courts. 489 U.S. at 351.

This case, indeed, presents the mirror image of *Castille*. Here, respondent's federal claims as to sufficiency of the evidence, voluntariness of his confession and waiver of his *Miranda* rights all were properly asserted on his appeal to the Illinois Appellate Court — the intermediate appellate court to which he was entitled to present his claims as of right. J.A. 23, 24-25. However, these claims were not included among those he asserted when he sought leave to appeal to the Illinois Supreme Court.

Nonetheless, as the Court of Appeals correctly recognized, the exhaustion requirement is satisfied once the habeas petitioner takes advantage of whatever appeals *as of right* the state system affords — *e.g.*, all appellate procedures that require the state appellate courts to reach the merits of claims properly presented on appeal. *See* James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* §23.3b at nn.20-24 and accompanying text (3d ed. 1998). Discretionary appeals such as petitions for writ of certiorari or leave to appeal need not be pursued where their denial does not constitute a ruling on the merits. *Compare Harris v. Reed*, 489 U.S. at 263 & n.9 (claims properly exhausted in Illinois state courts where presented to trial and intermediate appellate courts even if discretionary review is not sought in Illinois Supreme

Court) *with People v. Vance*, 76 Ill.2d 771, 390 N.E.2d 867, 872 (1979)(Illinois Supreme Court denial of leave carries no connotation of approval or disapproval of intermediate appellate court's action).

Iilinois Supreme Court Rule 315(a), which was modeled on this Court's former Rule 17 (now Rule 10), sets forth the factors that most states' highest courts consider:

> The following, while neither controlling nor fully measuring the court's discretion, indicates the character of reasons which will be considered: the general importance of the question presented; the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court's supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed.

See also Robert L. Stern, *Appellate Practice in the United States* §6.7(c) at 156-59 (2d ed. 1989)(collecting standards of review from various states' highest courts).

In this respect, the Illinois Supreme Court's highly selective standard for granting review mirrors that of the North Carolina Supreme Court, which this Court considered in *Ross v. Moffitt*, 417 U.S. 600 (1974). There, it ruled that the highly discretionary nature of review in states' highest courts generally did not compel the provision of counsel for criminal defendants seeking to make leave applications notwithstanding it was warranted for criminal appeals as of right. *Id.* at 610-11, 615, 617. *See also Buck v. Green*, 743 F.2d 1567, 1569 (11th Cir. 1984)(Georgia Supreme Court's certiorari jurisdiction is extremely limited, being restricted by the Georgia Constitution

to "cases in the Court of Appeals which are of gravity or great public importance (citations omitted)"); Arthur Karger, *The Powers of the New York Court of Appeals* §§133 & 135(a) & (d)(3d ed. 1997)(with the exception of capital cases, the power of the Court of Appeals in noncapital criminal cases is limited by the New York State Constitution to questions of law, as distinguished from questions of fact or discretion).

The actual court statistics bear out the practical impact of this jurisdictional limitation. Between 1990 and 1997, the Illinois Supreme Court has granted leave to appeal in only <3%-6% of the noncapital criminal cases brought up to it seeking review. *See* Administrative Office of the Illinois Courts, 1994 & 1997 *Annual Statistical Summaries of the Illinois Courts* (Table 2). These figures are exactly comparable to the minuscule percentage of noncapital criminal leave applications granted by the states' highest courts of California and New York during the same period. *See* Administrative Office of the Courts, Judicial Council of California, *Annual Court Statistics Report* (1998)(Tables 5 & 6)(California Supreme Court granted 4%-6% of noncapital criminal leave applications filed between 1987-1997); 1994 & 1997 *Annual Reports of the Clerk of the New York Court of Appeals* (Appendix Tables 12 & 13)(New York Court of Appeals granted 3% of noncapital criminal leave applications filed between 1987-1994).[2]

Given the limitations on jurisdiction and the breadth of discretion of the states' highest courts nationwide — and the relative paucity of the number of cases in which review is actually granted — it is manifest that requiring state prisoners to continue to burden the states' highest courts with

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2 *See also* Ruggero J. Aldisert, *Winning On Appeal* §1.3 at 11-13 (rev. ed. 1996)(collecting statistics on civil and criminal leave applications granted by thirty four states' highest courts during 1990).

discretionary leave applications that are doomed to failure warrants the reproach that it is the state prisoners, not the state remedies, that are being exhausted. *Parker v. Ellis*, 362 U.S. 574, 582 (1960)(Warren, C.J., dissenting); *United States ex rel. Kling v. LaVallee*, 306 F.2d 199, 203 (2d Cir. 1962)(Friendly, J.)(*accord*).

Under analogous circumstances, the Eighth Circuit has held that criminal leave applications need no longer be made to the Minnesota Supreme Court to satisfy the exhaustion requirement where, in practice, less than 25% of the petitions for discretionary review are granted. *Dolny v. Erickson*, 32 F.3d 381, 384 (8th Cir. 1994). *See also Williams v. Wainwright*, 452 F.2d 775, 776-77 (5th Cir. 1971)(unnecessary to seek review in Florida Supreme Court of intermediate appellate court's affirmance of a noncapital criminal conviction to satisfy exhaustion); *Smith v. White*, 719 F.2d 390, 392 (11th Cir. 1983)(unnecessary to seek review in Alabama Supreme Court); *Buck v. Green*, 743 F.2d at 1569 (unnecessary to seek review in Georgia Supreme Court).

The logic undergirding these decisions derives from that aspect of *Fay v. Noia*, 372 U.S. 391, 435-38 (1963) that still remains good law to this day — *viz.* state prisoners need not seek certiorari in this Court on their direct appeals before resorting to federal habeas review. *See Dolny*, 32 F.3d at 384. Here, where the Illinois Supreme Court has explicitly modeled its review standard on this Court's factors governing review by certiorari — and, indeed, grants review in comparably few cases — the same rule should apply for the same reason. As the Eighth Circuit observed in this regard (*id.* at 384):

> We believe that "[t]he right ... to raise" an issue referred to in §2254 means more than a mere opportunity to seek leave to present an issue; it means

a realistic, practical chance to present an issue and have it considered on the merits.

Here, the Illinois Supreme Court's miserly exercise of discretion "offers no practical remedy that [the state prisoner] was required to exhaust under §2254 .... The requirements of this section are rooted in the doctrine of comity and should not be so construed as to burden the state system with meaningless petitions for relief to forums which are not intended by state law to hear them." *Williams v. Wainwright*, 452 F.2d at 777. *See also Russell v. Rolfs*, 893 F.2d 1033, 1037-38 (9th Cir. 1990)("the word 'available' as used in 28 U.S.C. §2254(b) ... does not refer to an avenue that exists on a map but is closed permanently to the kind of vehicle being driven by the defendant").

State prisoners should not be put to the arid ritual and empty formality of filing leave applications in states' highest courts which, despite possessing technical jurisdiction, exercise it only rarely (*Dolny*) or are unlikely to entertain federal claims either because of *stare decisis* or because the claim calls for fact-intensive review. As the First Circuit has noted in this regard (*Allen v. Attorney General*, 80 F.3d 569, 573 (1st Cir. 1996)):

> If stare decisis looms, that is, if a state's highest court has ruled unfavorably on a claim involving facts and issues materially identical to those undergirding a federal habeas petition and there is no plausible reason to believe that a replay will persuade the court to reverse its field, then the state judicial process becomes ineffective as a means of protecting the petitioner's rights. In such circumstances, the federal courts may choose to relieve the petitioner of the obligation to pursue available state appellate remedies as a condition precedent to seeking a federal anodyne. (Citations omitted). The law, after all, should not require litigants to engage in empty gestures or to perform obviously futile acts.[3]

In this case, respondent sought to raise three issues that are properly cognizable on federal habeas review — and which must receive independent and plenary review at the district court level. Liebman & Hertz §2.4b at 22-32 (3d ed. 1998).[4] Respondent attacked: (a) sufficiency of the evidence (*Jackson v. Virginia*, 443 U.S. 307 (1979); *Wright v. West*, 505 U.S. 277 (1992)), (b) voluntariness of his confession (*Withrow v. Williams*, 507 U.S. 680, 693-94 (1993); *Miller v. Fenton*, 474 U.S. 104, 112-13 (1985); *Thompson v. Keohane*, 516 U.S. 99, 109-13 (1995)(*dicta*)), and (c) adequacy of his waiver of *Miranda* rights (*Brewer v. Williams*, 430 U.S. 387, 398 (1977); *Withrow*, 507 U.S. at 689-93).

All three issues contemplate the direct application of relatively unexceptionable federal legal principles to highly fact-intensive trial records. It calls for careful case-by-case adjudication, which invokes the reviewing court's law-applying — as opposed to law-making — function. Liebman & Hertz §2.4b at 32 (core difference between "courts with only appellate

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3 *See, e.g., Lynce v. Mathis*, 519 U.S. 433, 436 n.4 (1997)(Court is "satisfied ... that exhaustion would have been futile" because Florida Supreme Court previously rejected claim in other cases and counsel for the state "has not suggested any reason why the Florida courts would have decided petitioner's case differently"); *Blackledge v. Perry*, 417 U.S. at 23-24 ("futility" found because North Carolina Supreme Court "had consistently rejected" similar claims).

4 A claim is "cognizable" if it comes "within [the] jurisdiction of [a] court or power given to [a] court to adjudicate [a] controversy." *Federal Deposit Insurance Corp. v. Meyer*, 510 U.S. 471, 476 (1994).

capacities and those that also have original (evidence-taking) capacities"). Indeed, there are some states' highest courts (*e.g.*, New York) which do not possess any jurisdiction to review facts at all.

Here, the Court of Appeals properly determined that the Illinois Supreme Court encourages its litigants to exercise issue selectivity and actively discourages raising every conceivable claim of error on leave applications. J.A. 32-38.[5] It understood this as signifying that the Illinois courts do not consider it necessary to raise all claims in discretionary leave applications so long as they have been properly asserted in Illinois' intermediate appellate court on appeal as of right. This determination, which accords with a similar determination of another panel of the same court — *Gomez v. Acevedo*, 106 F.3d 192, 195-96 (7th Cir. 1997) is entitled to substantial deference by this Court. *See, e.g., Lambrix v. Singletary*, 520 U.S. 518, 525 (1997)("the courts of appeals and the district courts are more familiar than [Supreme Court]" with "procedural practices of the States"); *DeBuono v. NYSA-ILA Medical and Clinical Serv.*, 520 U.S. 806, 810-11 n.5 (1997)("settled practice of according respect to the court of appeals' greater familiarity with issues of state law"); *McMillian v. Monroe County*, 520 U.S. 781, 786 & n.3 (1997) (because "jurisdiction of the [11th Circuit] Court of Appeals includes Alabama" and because "two of the three judges on the Eleventh Circuit's panel are based in Alabama", "we defer considerably to that court's expertise in

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5 Indeed, given the selectivity of states' highest courts, as well as their function as the unreviewable final arbiter of state law (*Stringer v. Black*, 503 U.S. 222, 235 (1992)), it would be entirely appropriate for a litigant to seek review in the state's highest court of a potentially dispositive question of state law, otherwise unreviewable on federal habeas corpus, where his federal claims may otherwise still be heard in federal courts. *See, e.g., Estelle v. McGuire*, 502 U.S. 62 (1991)(errors of state law ordinarily are not cognizable on federal habeas review).

interpreting Alabama law").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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